No. 08-1172

In the Supreme Court of the United States

JOSEPH P. NACCHIO,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

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INTRODUCTION

Pursuant to Rule 44.2, Nacchio respectfully petitions for rehearing of this Court's October 5, 2009 Order denying certiorari. Petitions for rehearing are appropriate when there are "intervening circumstances of a substantial or controlling effect" or "other substantial grounds not previously presented." S. Ct. Rule 44.2. Both grounds apply here. On October 13, 2009, this Court granted certiorari in *Skilling v. United States*, No. 08-1394, to decide whether Skilling was entitled to a change of venue because a presumption of prejudice arose from adverse pretrial publicity. This case presents the same issue: whether Nacchio was entitled to a presumption of prejudice due to inflammatory pretrial publicity and whether the government may rebut that presumption.

This Court should hold this petition pending a decision in *Skilling* and then consider whether rehearing is appropriate. When this Court issues a decision providing new guidance on criminal law, it frequently grants rehearing, and then either considers those cases on the merits or grants, vacates, and remands for reconsideration. This Court does so even if the issue was not raised in the original petition or on appeal. *See infra* §II. If this Court articulates a presumed prejudice standard that may entitle Nacchio to a new trial, he should receive the benefit of that ruling because his conviction is not final until rehearing is denied. The government will not be prejudiced because Nacchio is already serving his sentence.

I. NACCHIO'S CASE PRESENTS AN ISSUE ON WHICH THIS COURT GRANTED CERTIORARI IN *SKILLING*

A. Proceedings Below

Nacchio sought a pre-trial change of venue because inflammatory pretrial publicity rendered the atmosphere in Denver pervasively prejudicial. The government opposed Nacchio's motion, invoking Tenth Circuit precedent holding that prejudice is presumed from negative pretrial publicity "'rarely ... and only in extreme situations'" where "'the influence of the news media either in the community at large or in the courtroom itself, pervaded the proceedings and created either a circus atmosphere in the court room or a lynch mob mentality such that it would be impossible to receive a fair trial.'" Gov't Opposition to Motion for Change of Venue 3 (Doc. 128)[1] ("Venue Opp.") (quoting *United States v. McVeigh*, 153 F.3d 1166, 1181 (10th Cir. 1998), and *Hale v. Gibson*, 227 F.3d 1298, 1332 (10th Cir. 2000) (internal citations omitted), *cert. denied*, 533 U.S. 957 (2001)).

The district court acknowledged that "[t]he publicity has been extensive" and often "not favorable to Nacchio," but characterized the cases finding a presumption of prejudice as situations where "bedlam reigned at the courthouse," where "media invasion of the courtroom ... destroy[ed] the dignity and integrity of the trial process," where "repeated broadcasts in a small community of the defendant's videotaped confession [produced] a kangaroo court," or where

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[1] "Doc." refers to *United States v. Nacchio* (D. Colo. No. 05-cr-545).

"there was evidence of a circus atmosphere or lynch mob mentality." Pretrial Conference Tr. 69-70 (Doc. 111). The motion was denied. After Nacchio was convicted, he moved for a new trial and change of venue, noting that the prejudicial pretrial publicity continued unabated and even intensified during trial. Motion for New Trial (Doc. 430) ("New Trial Motion") The motion was denied. Sentencing Minutes (Doc. 458).

Nacchio did not raise the venue issue on appeal based on futility. The Tenth Circuit has *never* found a presumption of prejudice or reversed a district court's decision not to transfer a criminal case because of pretrial publicity.[2] The most recent opinion explained that "[i]n this circuit ... we h[o]ld that prejudice will only be presumed where publicity 'created either a circus atmosphere in the court room or a lynch mob mentality such that it would be impossible to receive a fair trial.'" *Goss v. Nelson*, 439 F.3d 621, 628 (10th Cir.

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[2] *See McVeigh*, 153 F.3d 1166; *United States v. Pedraza*, 27 F.3d 1515 (10th Cir.), *cert. denied*, 513 U.S. 941 (1994); *United States v. Abello-Silva*, 948 F.2d 1168 (10th Cir. 1991), *cert. denied*, 506 U.S. 835 (1992); *United States v. Cattle King Packing Co.*, 793 F.2d 232 (10th Cir.), *cert. denied*, 479 U.S. 985 (1986); *United States v. Affleck*, 776 F.2d 1451 (10th Cir. 1985); *United States v. Neal*, 718 F.2d 1505 (10th Cir. 1983), *cert. denied*, 469 U.S. 818 (1984); *United States v. Hueftle*, 687 F.2d 1305 (10th Cir. 1982); *United States v. Hall*, 536 F.2d 313 (10th Cir.), *cert. denied*, 429 U.S. 919 (1976); *United States v. Tokoph*, 514 F.2d 597 (10th Cir. 1975); *United States v. Jobe*, 487 F.2d 268 (10th Cir. 1973), *cert. denied*, 416 U.S. 955 (1974); *United States v. Smaldone*, 485 F.2d 1333 (10th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); *United States v. Michals*, 469 F.2d 215 (10th Cir. 1972); *see also Goss v. Nelson*, 439 F.3d 621 (10th Cir. 2006) (habeas review); *Hale*, 227 F.3d 1298 (same); *Stafford v. Saffle*, 34 F.3d 1557 (10th Cir. 1994) (same), *cert. denied*, 514 U.S. 1099 (1995).

2006) (citation omitted). In holding that Timothy McVeigh was not entitled to a transfer from Denver, the court similarly required proof of a "'circus atmosphere or lynch mob mentality,'" 153 F.3d at 1181 (citation omitted), of the sort that realistically can occur only in a small "close-knit community" where everyone knows the victim of a violent crime, *id.* at 1183 n.4 (discussing *Coleman v. Kemp*, 778 F.2d 1487 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986)). The Tenth Circuit essentially drew a line between a widely broadcast unconstitutional videotaped confession by the defendant (which requires transfer per *Rideau v. Louisiana*, 373 U.S. 723 (1963)), and widespread reporting of an improperly obtained confession that the defendant subsequently denied. *Id.* at 1182-83. The Tenth Circuit's precedents apply a significantly more stringent standard than the one later applied by the Fifth Circuit—"'inflammatory pretrial publicity that literally saturated the community in which his trial was held.'" *United States v. Skilling*, 554 F.3d 529, 558-59 (5th Cir. 2009) (citation omitted).[3]

A Tenth Circuit panel held that Nacchio was entitled to a new trial because his expert was erroneously excluded and that a new judge would preside over the trial. The *en banc* Court later reinstated Nacchio's conviction in a sharply divided 5-4 decision.

Nacchio's certiorari petition sought review because the Tenth Circuit's materiality standard conflicted with

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[3] *Skilling* was not decided until almost a year after the Tenth Circuit panel reversed *Nacchio*'s conviction, and the Fifth Circuit's prior precedents did not make clear that it would find presumed prejudice in circumstances like these.

other circuits, and on the *Daubert* issues that divided the *en banc* court. This Court requested the record from the lower courts and held the petition over the summer recess, but denied certiorari on October 5, 2009. A week later, certiorari was granted in *Skilling*.

B. The Venue Facts In This Case Are Sufficiently Similar To *Skilling* To Warrant A Hold Pending That Decision

The Fifth Circuit held that a rebuttable presumption of prejudice arose in *Skilling* because of extensive pretrial publicity. This Court agreed to review Skilling's argument that a presumption of prejudice cannot be rebutted and requires automatic reversal. The government's opposition cited *McVeigh* for the "'extremely high' burden" standard applied in the Tenth Circuit, and argued that no presumption of prejudice should have been triggered in the first place. U.S. Br. in Opposition 13-17. In resolving *Skilling*, therefore, this Court necessarily will address both aspects of the standard for assessing the impact of pretrial publicity.

Under *Skilling*, Nacchio would have been entitled to a presumption of prejudice due to the fervent, vitriolic, and inflammatory press that saturated the community. The similarities in the atmosphere and publicity are striking. Declaration of Edward J. Bronson in Support of Venue Motion O-20 (Doc. 120) ("Bronson Decl.").

- Qwest, like Enron, was a symbol of the success of city, was the city's largest employer, and the residents of Denver had a personal and emotional stake in the outcome. *Id.* at O-23.

- Thousands of Denver Qwest employees lost their jobs when Qwest downsized, and pensions were decimated due to the stock-price decline. *Id.* at O-25.

- The press frequently compared Nacchio to Skilling and wrote that the Enron verdicts "portends well for the [Nacchio] prosecutors." Motion for Change of Venue 26 (Doc. 113) ("Venue Motion").

- The prosecution repeatedly invoked Enron, submitted the district court's *Skilling* venue decision, and told the court it should not change venue because *Skilling* received no change of venue. Venue Opp. 10 & Attachment 3.

- Qwest's CFO's guilty plea was called the crucial "final step" in convicting Nacchio, and analogized to Fastow testifying against Skilling. Venue Motion 18.

- Local newspapers continuously ran personal interest stories about sympathetic former employees angrily blaming Nacchio for Qwest's downsizing and the decline in stock price. Bronson Decl. O-24-25, 30-31, 34-35. *The Rocky Mountain News* ("*RMN*"), wrote in "Starting Over," that former workers "are angry, mostly at former Chief Executive Joe Nacchio" who they "blame ... for the collapse of a company that provides the livelihoods of so many hard-working employees." Venue Motion 14.

- *The Denver Post* ("*Post*") alone wrote 40 editorials about Nacchio and the case. Bronson Decl. O-20.

- A pre-trial study showed that 53% of respondents had heard of the case and 34% had a negative impression of Nacchio. Sixty-one percent of *RMN* readers had heard of the case and 45% had a negative impression; 64% of *Post* readers had heard of the case and 52% had a negative impression. Motion Regarding Jury Voir Dire 12 (Doc. 299) ("Voir Dire Motion").

Prior to indictment, the press persistently questioned why Nacchio had yet to be charged with any criminal wrongdoing. The *Post* asked "Where is Nacchio?" and lamented that "[e]lsewhere, prosecutors are nailing the honchos." Bronson Decl. O-29. The *Denver Business Journal* ("*DBJ*") named Nacchio the "local poster boy for ... revenue manipulation," and the "hands-down winner" of the "Greedy, stupid and blind" award. Venue Motion 9-10. A *Post* editorial read: "Ebbers guilty verdict sends clear message: When a company like WorldCom—or Qwest—props itself up on fraud and lies, the chickens will come home to roost." Bronson Decl. O-31. And the *Post* assured readers that "there's far more evidence alleged here about Nacchio's involvement than ever was alleged against Bernie Ebbers." *Id.*

The day after indictment, "Cuffed and charged" headlined the *RMN*, and "experts" pronounced "it[] a given" that Nacchio was guilty, because he was "selling in the back alley when the public didn't know what he knew." Venue Motion 25. U.S. Rep. DeGette was "not surprised," because "it was *obvious* that [Nacchio's] business practices were over the edge." *Id.* at 2. The *Post* reported that Denver residents "have been waiting years for this," "[t]here were a lot of smiles on people's faces," and "were finally able to take down a

corrupt individual," *id.*, and published letters requesting a picture of the "blessed sight" of Nacchio "doing the perp walk," *id.* at 3. The *RMN* wrote about "[a]ngry US West retirees" celebrating, "crossing their fingers" and "wishing for a conviction." *Id.* at 16. Another article told prosecutors to "[s]queeze Joe" and make him "squeal like the pig he is." *Id.* at 2. The *Post*'s blog had a story: "A jury duty volunteer for Nacchio's trial," that stated: "I'd love to be on the jury of nacchio's trial. I'd make sure the son of a (bleep) hung," and a commenter suggested the government raise revenue "by selling raffle tickets for places in the jury pool." *Id.* at 15-16.

Nacchio was portrayed as an unwelcome outsider, Bronson Decl. O-37, and a *DBJ* article asked: "Whose Side Are You On," Reply on Motion for Change of Venue 13 (Doc. 138) ("Venue Reply"). A letter to the editor described the "[m]any" who were "so cruelly deceived" by Nacchio and his "cronies" "who sought to enrich themselves so grotesquely off the bones and enthusiastic efforts of so many unsuspecting employees." *Id.* at 14. A *Post* letter said it was "Tar and feathers time" "for 'the guy who led Qwest into the toilet.'" Bronson Decl. O-27. A *Post* blog entry said Nacchio was "a thug" who "defrauded Americans." New Trial Motion at 5. Nacchio was compared to Kim Jong Il, *id.* at 4, and "Alferd E. Packer, one of only two Americans ever jailed for cannibalism," Venue Reply 13. The *Post* said "Nacchio either wears an exceptionally poor toupee or has a natural hairline that looks as though it was drawn on using a Magic Marker and a ruler." Bronson Decl. O-26. He was described "a slick New Jersey confidence man," Venue Motion 3, who "gave people from there" a "bad name," Venue

Reply 12. People even accosted Nacchio on the streets outside the courthouse. New Trial Motion 12-13.

Defenses were called the "Alice in Wonderland defense." Venue Motion 25. A *Post* columnist called Nacchio's prior speech on corporate integrity "pure comic genius ... full of irony." Bronson Decl. O-30. Articles claimed Nacchio's conduct would not "speak[] well of Joe Nacchio's patriotism" and that he could be seen "as pro-terrorist." Venue Motion 26. A news anchor said the press only "started turning ... negative for Mr. Nacchio" "when it became *clear* that the books were being doctored." Venue Reply 16.

Nacchio's venue motion was met with a mocking *DBJ* article "C'mon, Somebody Out There Must Like Nacchio." *Id.* at 11. Another *Post* editorial sarcastically wrote "Joe Nacchio wants to go home," and focused on "the personal burdens of Denver-area retirees who might want to attend the trial, *which will determine culpability in an episode that led to the decimation of their retirement funds*." *Id.* at 8-10.

The *Post* and *RMN* created webpages that covered every detail about the trial, and promised trial commentary from "our panel of US West retirees." Voir Dire Motion 8-9. News Channel 9 told current and former employees to contact the station to share their stories. *Id.* at 9-10. Days before trial, the *RMN* wrote that retirees were "still angry," would attend the trial in droves, and hoped to testify as "victims." New Trial Motion 5.

The *Post* even filed a motion explaining that "[t]he criminal proceedings concerning Qwest Communications in general and this criminal defendant in particular have been the subject of *extensive* press

reports and public interest, locally .... Mr. Nacchio['s conduct] unquestionably had devastating and far-reaching impact upon numerous residents of the Rocky Mountain region, who are also among the readership of *The Denver Post*." Objection of Denver Post to Motion to Close Courtroom 2 (Doc. 142).

The same expert witness was retained in *Nacchio* and *Skilling*, recommended a change in venue in both cases, and found that the pretrial press in this case was "remarkable" and "off the scale compared to other cases." Bronson Decl. at O-15-16, 19. Of the hundreds of trials Professor Bronson has consulted or testified in (which include recommending against a change of venue 150 times and for a change of venue 106 times), *id.* at O-5, only the Oklahoma City bombing trials and Skilling's trial had more adverse pretrial publicity than Nacchio's case, *id.* at O-16.

II. THIS COURT SHOULD HOLD THIS PETITION UNTIL *SKILLING* IS DECIDED

This Court routinely denies petitions for rehearing that merely recycle issues previously presented, but in the wake of significant new decisions--particularly in the criminal area—it has granted petitions for rehearing if the defendant could benefit from the new decision.

Most recently, for example, in the immediate aftermath of *Blakely v. Washington*, 542 U.S. 296 (2004), this Court granted several petitions for rehearing from certiorari petitions previously denied, when the petition for rehearing indicated that the petitioner might benefit from *Blakely*'s holding. Such petitions were granted even when the constitutionality

of the sentencing guidelines was not challenged in the original petition or on appeal.[4] This Court has taken similar action after other important new criminal cases, such as *Bailey v. United States*, 516 U.S. 137 (1995).[5] Gressman confirms that "[q]uestions not presented in the original petition are not foreclosed upon rehearing," Eugene Gressman et al., *Supreme Court Practice* 821 (9th ed. 2007) (citing *White v. Texas*, 309 U.S. 631, 310 U.S. 530 (1940)), and that the "usual" reason for a *sua sponte* grant of rehearing "is the fact that, subsequent to the denial of certiorari, review has been granted in some other case raising identical or very similar issues." *Id.*

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[4] *See, e.g., McDonnell v. United States*, 543 U.S. 1116 (2005) (granting petition for rehearing from denial of certiorari which argued that "[a]lthough Mr. McDonnell did not raise this claim in the district court, on appeal to the Fifth Circuit, or in his petition for certiorari, that does not preclude this Court's GVR'ing this case in light of *Blakely*," Rehearing Petition 9 (No. 03-10417)); *United States v. Newsome (De Los Santos)*, 543 U.S. 1116 (2005) (granting rehearing petition acknowledging that the *Blakely* issue was not raised on appeal for futility reasons, Rehearing Petition 10-11 (No. 03-10272); certiorari petition challenged only the Fifth Circuit's refusal to consider unpublished cases precedential); *Criston v. United States*, 543 U.S. 1117 (2005) (similar); *United States v. Campbell*, 543 U.S. 1116 (2005) (similar); *United States v. Van Alstyne*, 543 U.S. 1116 (2005) (similar); *Hawkins v. United States*, 543 U.S. 1097 (2005) (similar).

[5] *See, e.g., Friend v. United States*, 517 U.S. 1152 (1996) (granting petition for rehearing which acknowledged that "the issues addressed in *Bailey* were not raised by Friend in his Petition [for certiorari]," Rehearing Petition 10-11 (No. 95-642)); *Fuentes v. United States*, 516 U.S. 1022 (1995) (granting rehearing petition, No. 94-1412, and GVR'ing in light of *Bailey*; certiorari petition had argued only that §924(c) and conspiracy were not separate counts).

If this Court adopts a standard for presuming prejudice from pretrial publicity similar to the one applied in *Skilling*, Nacchio would be entitled to a new trial. At a minimum, this Court may wish to GVR to permit the Tenth Circuit to apply the new standard.

CONCLUSION

The petition for rehearing should be held and considered in light of this Court's decision in *Skilling v. United States*, No. 08-1394.

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CERTIFICATION OF COUNSEL

As counsel for petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

DATED: October 30, 2009.

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